

Tracey Turek
PO Box 587
Stevensville MT 59870
406-239-5141

January 14, 2009

House Natural Resource Committee

Testimony in support of, and proposed amendments to, House Bill 39 and 40.

House Bills 39 and 40 have been introduced at the request of the Water Policy Committee. The Water Policy Committee was given a very daunting task last session, and I commend their efforts. I will begin with House Bill 40.

House Bill 40

First, the Committee found that due to House Bill 831, permitting in closed basins should be clarified and the DNRC process streamlined. House Bill 40 address these findings, but also is in response to a ruling in the Gallatin County District Court - Bostwick Properties, Inc. vs. Montana Department of Natural Resources and Conservation (cause No. DV-074-917AX). The Bostwick case concluded there were serious flaws in the DNRC's interpretation and implementation of statutes and policies; so much so, it ordered the State to pay Bostwick's attorney fees, which could exceed \$50,000.

House Bill 40 addresses these concerns but does not go far enough.

The problem lies within the very basic principle of water law - beneficial use. The Montana Constitution affirmed and protected all existing water rights by stating in Article IX § 3:

Water Rights. (1) All existing rights of the use of any water for any useful or beneficial purpose are hereby recognized and confirmed.

The question is how you determine the beneficial use of water and who ultimately is charged with that determination. From the beginning, water has historically been quantified by a flow rate. It was, and still is, easy to determine the rate at which one diverts water. The more difficult question is how much of that diverted water has been put to "beneficial use".

The Supreme Court grappled with this very issue in McDonald vs. State of Montana (Case No. 85-468). The Case was filed in response to the Montana Water Court decreeing a volume quantification on direct flow irrigation rights. The Court held that:

"... We can also accept as true their contention that the volume of water used by irrigators up to or within the limit of their appropriation rights would vary greatly from year to year..." (page 6 - opinion of the Court).

The Court ultimately determined that the extent of an appropriators right is that which is "reasonably necessary" for beneficial use. The Court ultimately ruled that:

"In so holding, we place no added burden on the owners of pre-July 1, 1973 irrigation water rights, nor do we offend the provisions of Art. IX, S 3 (11, of the 1972 Montana Constitution. Flow rate contained in Water Court decrees must still be expressed in cubic feet per second, as they had earlier been expressed, and in the long run the amount actually needed for beneficial use within the appropriation will be the basis, the measure and the limit of all water rights in Montana as between appropriators, and as between appropriators and others." (page 16 – opinion of the Court).

Based upon the Supreme Court's decision, the Montana Water Court no longer decrees specific volume quantifications on direct flow irrigation rights.

Yet, the DNRC believes it can make such a determination and actually limits historic water rights to this amount.

When someone applies for a new permit under HB831, the applicant must determine how much water they will "consume" for the new proposed use. This amount must then be mitigated, which is basically to retire or relinquish an existing right for the same amount of water. To do this, the DNRC requires an Application to Change a Water Right. The DNRC Change Application process requires you to prove the amount of the historic beneficial use of the right proposed to be changed.

In theory this principle may be correct, but the DNRC's policies and procedures are not. The DNRC believes it is not bound by either the Supreme Court or the Montana Water Court in determining the extent of a water right.

The DNRC's own rules state:

36.12.1902 CHANGE APPLICATION - HISTORIC USE

(1) Final water court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application, however, this information or an abstract of a water right from the department or the Montana water court by itself is not sufficient to prove the existence or extent of the historical use.

They go even further and have concluded the basis, measure and limit of a water right is the amount of water "consumed". The problem is how they determine this "consumptive use".

First, they determine the diverted flow rate and amount of historically irrigated acres they will accept. Even if the Chief Water Judge has signed an order decreeing those elements, the DNRC does not have to accept them and in fact they don't.

Next, they require an applicant to provide proof of the amount, timing and duration water applied to those acres. They do this in an attempt to determine how much water was "consumed" on each acre. However, there are no records as to how much water was actually applied to each irrigated acre and no one knows the exact amount of water historically "consumed". Which is exactly what the Supreme Court recognized - that it is an ever changing variable that cannot be easily quantified. The DNRC has decided in the absence of this proof, they will utilize a formula based upon the average county crop production levels as of 1973 to calculate the consumptive use. The validity of these levels are highly questionable.

Therefore, to ensure we abide by the Constitution and the Supreme Court's opinion, the legislature should define and give direction to the DNRC as to what is acceptable in determining historic beneficial use. The basic principles are that:

1. The DNRC should not be able to simply disregard orders and decisions made by the Montana Water Court as it relates to the adjudication of existing water rights.
2. If they must determine a value for consumptive use, then they should only utilize the best scientific calculations available to calculate this value and not use subjective crop production survey numbers. For instance, the NRCS has created a computer program that utilizes scientific calculations to determine irrigation requirements.

To accomplish this, amendments to HB 40 should be made which include:

(4) "Beneficial use", unless otherwise provided means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power and recreational uses.

(i) use, is defined as the amount which is reasonably necessary for such purposes and based upon the amount actually needed;

(ii) historical beneficial use, is defined as the amount which has been determined by the Montana Water Court;

(new #) "Historical Irrigation Consumptive Use" means the maximum amount of water used per the historically irrigated acres determined by the Montana Water Court or the Supreme Court Claims Examination Rules and calculated utilizing a scientific determination of evapotranspiration calculations.

House Bill 39:

The Water Policy Committee recommended that:

Water Use Enforcement

B. Recommendation: When enforcing water law, priority should be given to protecting the rights of senior water users....

I whole heartedly agree. Only when the state must enforce its rulings and decisions, will it truly realize the implications of those such decisions.

The DNRC is an agency gone astray. As mentioned above, the Court found in Bostwick, the DNRC has serious flaws in its interpretation and implementation of the law and its own policies. Bostwick is just one case, but there are many others where the DNRC's questionable, arbitrary and conflicting decisions will have hugely significant impacts upon the people of this state.

There is no clearer example than the DNRC's recent decision regarding Georgetown Lake. The Granite County Commissioners filed an Application to Change, 76GJ-30012925, for their existing power generation storage right for Georgetown Lake to simply add fish, wildlife, and recreation purposes. The application indicated no additional water would be diverted or used because the historic management and operation of the water would not be altered and thus would have no adverse affect upon any other water users. The DNRC ruled there would be no adverse affect, yet denied the application stating:

"The Applicant has not proven by clear and convincing evidence that the quantity of water proposed to be used is the amount necessary for the proposed beneficial uses and the amount of water requested for the added purposes is not a waste of water. Without this proof a determination that the proposed use is beneficial cannot be made."

However, in a similar case *The Matter of Applications No. 41H-30013196 and No. 41H-30013197*. The DNRC granted an Application to Change to add a new pond stating that:

"...In the instant matter it is clear that in addition to using the ponds for fishery purposes, the applicant desires to use the ponds for recreational purposes including aesthetic purposes. While quantification of a water use for recreation and aesthetic purposes is highly subjective, I find that using the water from the area previously irrigated, which is not a gravel pit, for recreational and aesthetic purposes is a reasonable use of the water...."

The arbitrary and inconsistent decision by the DNRC with respect to quantifying beneficial use in the Georgetown Lake case means, the only legal right for the water stored in Georgetown Lake can be for generating power. Presently, there is no power being generated which means any water stored in Georgetown Lake is an illegal appropriation of water.

HB 39 proposes to create a new Enforcement Program under the supervision and control of the attorney general. Maybe their first task should be to enforce the DNRC's decision and drain Georgetown Lake due to the illegal appropriation of water. Or maybe an alternative would be for the Enforcement Program to begin by reviewing the DNRC's policies, procedures and administrative hearings decisions, as they pertain to protecting senior water users and their historic water rights.

Thank you for your time.

Tracey Turek
PO Box 587
Stevensville MT 59870